BANDAR RAYA DEVELOPMENTS BERHAD

v.

ANG YOKE LIN CONSTRUCTION SDN. BHD.

HIGH COURT, KUALA LUMPUR
TUAN EE CHIN SENG JC
[CIVIL SUIT NO. S1-22 68-92]
17 DECEMBER 1992

PRACTICE & PROCEDURE: Mandatory injunction - Application for injunction requiring defendant to execute document and hand over water system - Whether should be granted; parties to contract - Whether plaintiff correct party - Existence of 2 contracts - Whether separate and distinct; contract with defendant - Whether plaintiff contracted as agent or principal - Intention of parties - Whether to contract as principals - Agency point not pleaded - Significance; specific performance - Whether available - Terms of contract whether certain - Term having to be implied - Whether contract incomplete - Relief sought - Whether of building contract - Execution and delivery up of document - Whether amounted to enforcement of personal services - Interim injunction - Whether governed by s. 54 or s. 51(1) of the Specific Relief Act 1950; test applicable - Whether balance of justice test or higher test; term to be implied - That defendant execute document and hand over water system - Whether could be implied at interlocutory stage of proceedings; relief sought - Whether could be refused on discretionary grounds - Unreasonable delay - Whether relief could still be granted - Relevant parties to contract - Whether KSM relevant party - Balance of convenience - Whether against granting of relief - Damages - Whether quantifiable - Order to be made - Need to protect defendant's interests.

The plaintiff applied for a mandatory injunction requiring the defendant to forthwith execute Form KA-1 within 7 days to hand over the water system constructed by the defendant on the housing development on certain lots in Serdang to the Jabatan Bekalan Air.

On 8 August 1986, a receiver was appointed over the assets of Koperatif Serbaguna Malaysia Bhd. ('KSM'). By a contract dated 13 August 1986 (Exhibit L-2) entered into by the defendant and KSM, the defendant agreed to execute water supply reticulation and ancillary works for the proposed housing development on the pieces of land in Serdang. On 23 January 1987, the plaintiff wrote to the defendant a letter, the defendant assenting to the terms contained therein by signing at its foot under the endorsement that recited acceptance of the terms (Exhibit L-4). The plaintiff claimed this comprised a separate contract between itself and the defendant.

The action was based on this document. The document however did not refer to an obligation on the part of the defendant to execute Form KA-1 or to hand over the water system to the Jabatan Bekalan Air. The plaintiff's case was that such a term was to be implied into the document and enforced against the defendant. The defendant refused to sign Form KA-1 because KSM owed it money for work done. The plaintiff, though disputing that the defendant was entitled to any monies, was nevertheless prepared to secure the defendant's claim in exchange for the performance of the act sought to be compulsorily enforced by means of the injunction sought for. The project had been completed and water been supplied. But while the residents had to pay RM5, the plaintiff was paying the water authority the commercial rate for every gallon supplied to the project.

Held:

A. *Decision on the application*

The plaintiff should be granted the injunction prayed for. Otherwise, a positive injustice would be rendered to the plaintiff.

[1] The proper parties to the contract upon which the action had been brought, namely that contained in Exhibit L-4, were the plaintiff and the defendant. The matter was really one that turned on the true intention of the parties as expressed in writing. The plaintiff was entitled to rely on the independent contract which it had entered into with the defendant. The law recognises that more than 1 contract can exist in respect of the same subject matter.

[2] The plaintiff was contracting as a principal, not as an agent. Although the words 'on behalf of' appear in the body of the document (Exhibit L-4), if one were to look at the contract as a whole, it appeared that the parties

intended that each of them should contract as principal. The question whether the person actually signing a contract is to be deemed to be contracting personally or as an agent only, depends upon the intention of the parties, as discoverable from the contract itself. Where a person signs a contract in his own name without qualification, he is *prima facie* deemed to be contracting personally, unless it was apparent from the terms of the contract that he did not intend to so contract but was acting only as agent.

The agency point had been pleaded neither in the statement of defence nor in the affidavits filed on the defendant's behalf. Therefore, there was strong justification in the plaintiff's contention, that the agency point was really an after thought.

[3] The contract in Exhibit L-4 was capable of specific performance.

(a) It was a complete contract, the terms of which were reasonably certain, and its enforcement by injunction was not precluded by the provisions of the Specific Relief Act 1950. The fact that a term has to be implied into a contract does not make the contract itself uncertain.

(b) What was being sought was not an injunction enforcing a building contract or contract for personal services, but an injunction to compel the defendant to execute and deliver up a document. An injunction compelling a defendant to execute and deliver up a letter or other document is not an unknown remedy and does not amount to an enforcement of personal services.

(c) It was s. 51 of the Specific Relief Act 1950, which was applicable. Be it a prohibitory or a mandatory injunction of an interlocutory or interim nature, the governing provisions are those contained in s. 51(1) of that Act, and not s. 54.

[4] The plaintiff must bring itself within and satisfy the '*Shepherd Homes*' test. It must show a strong and clear case or an unusually sharp case. The '*Shepherd Homes*' test has been adopted and applied in our jurisdiction. Though the 'balance of justice test' formulated by Hoffmann J in *Films Rover* case appeared to be the correct test, its application would involve a departure from the judicial pronouncements made by our Courts, the decisions of which were plainly binding.

[5] The plaintiff had made out a strong and sharp case for the interlocutory relief sought. It has made out a strong case for a term to be implied into the contract in Exhibit L-4 imposing upon the defendant an obligation to complete and execute Form KA-1 and hand over the water system to Jabatan Bekalan Air. The test for implying a term is necessity. Each case must necessarily fall to be decided on its own facts. The term sought to be implied would certainly be implied at the close of all the evidence at the trial of the action.

[6] There was no reason to refuse the relief sought for on discretionary grounds.

(a) The relief should not be denied despite the delay on the part of the plaintiff. The Court remained unconvinced that the delay had any prejudicial effect upon the defendant. Mere unreasonable delay is not in itself sufficient to lead to a refusal of relief. In determining whether to issue a mandatory injunction, the steps already taken by a defendant would be most relevant as it would be practically unjust to compel him to depart from a course of conduct upon which he has already embarked. On the other hand, the case of a defendant who has done nothing and who will suffer no hardship whatsoever and who has suffered no prejudice because of any delay on the plaintiff's part must surely fall to be judged on different considerations.

(b) The relevant parties were before the Court. Regarding KSM, the Court did not require it as a party before it to enable it to exercise its discretion and arrive at a reasoned judgment on the application.

(c) The balance of convenience lay in favour of the plaintiff and the grant of the relief sought. Damages were not an adequate relief, as the plaintiff's loss was not quantifiable.

B. *Order*

However, the plaintiff must be directed, as a term of the injunction, to deposit into Court within 14 days the sum counterclaimed by the

defendant against KSM together with interest at 8% per annum from the date of the contract with KSM until the date of payment into Court. In the event of the plaintiff failing to make such payment, the injunction shall automatically and without more vacate. The Court was duty bound to ensure that the order proposed to be made against the defendant did no more harm than was absolutely necessary and that the defendant's interests were also sufficiently protected.

[*Defendant ordered to execute Form KA-1 and hand over the water system to Jabatan Bekalan Air within 7 days after payment into Court by the plaintiff*].

Cases referred to:

Shanklin Pier Ltd. v. Detel Products [1951] 2 KB 854 ***(foll)***

Ogden v. Hall [1879] 40 LT 751 ***(foll)***

Vethanayagam v. Karuppiah [1968] 1 MLJ 283 ***(refd)***

T.R. Hamzah & Yeang Sdn. Bhd. v. Lazar Sdn. Bhd. [1985] 2 MLJ 45 ***(foll)***

Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 ***(refd)***

Bina Satu Sdn. Bhd. v. Tan Construction [1988] 1 MLJ 533 ***(refd)***

Films Rover International Ltd. v. Cannon Film Sales Ltd. [1987] 1 WLR 670 ***(refd)***

Businessworld Computers Pty. Ltd. v. Australian Telecommunications Commission [1988] 82 ALR 499 ***(refd)***

Boonsom Boonyanit v. Adorna Properties Sdn. Bhd. [1990] 2 CLJ 978/[1990] 3 MLJ 444 ***(foll)***

Tan Lay Soon v. Kam Mah Theatres Sdn. Bhd. [1992] 4 CLJ 1922 ***(foll)***

Wah Loong (Jelapang) Tin Mine v. Cheah Ngen Yiok, [1975] 2 MLJ 109 ***(refd)***

Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd., [1979] 1 MLJ 150 ***(refd)***

Bank Islam Malaysia Bhd. v. Tinta Press Sdn. Bhd. & Ors. [1986] 1 MLJ 256 ***(refd)***

Tinta Press Sdn. Bhd. v. Bank Islam Malaysia Bhd., [1987] 1 CLJ 474/[1987] 2 MLJ 192 ***(refd)***

Senator Lau Keng Siong & Anor. v. Ng Cheng Kiat [1990] 3 MLJ 417 ***(refd)***

RCA Sdn. Bhd. v. Pekerja-Pekerja RCA Sdn. Bhd. & Ors., [1991] 1 CLJ 19/[1991] 1 MLJ 309 ***(refd)***

Gibb & Co. v. Malaysia Building Society Bhd. [1982] 1 MLJ 271 at p. 273 ***(foll)***

Liverpool City Council v. Irwin [1977] AC 239 ***(foll)***

Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. [1986] 1 AC 80 ***(foll)***

Evercrisp Snack Products (M) Sdn. Bhd. & Anor. v. Sweeties Food Industries Sdn. Bhd. [1980] 2 MLJ 297 ***(dist)***

Legislation referred to:

Contracts Act 1950, s. 183

Specific Relief Act 1950, ss. 20(1)(2), (b) & (c), 51(1), 54(f)

Indian Contracts Act 1872, s. 230

Other sources referred to:

Contract, Chitty, 26th Edn., Vol. 1 para 1323

Equitable Remedies, Dr. Spry**,** 4th Edn., p. 480

Indian Contract and Specific Relief Acts, Pollock & Mulla, 10th Edn.,

For the plaintiff - Philip Choong & Sri Ram; M/s. Philip Choong & Co.

For the defendant - Paul Ong & Cecil Abraham; M/s. Paul Ong & Co.

JUDGMENT

Ee Chin Seng JC:

The plaintiff originally filed an application for several reliefs against the defendant, including a prayer for a mandatory injunction requiring the defendant to forthwith execute Form KA-1 within 7 days to hand over the water system constructed by the defendant on the housing development on Lots 3399, 3400, 3505 and 3506 in the Mukin of Serdang, District of Petaling ("the said lands") to the Jabatan Bekalan Air. There is also a consequential prayer that in default of the defendant executing the document as aforesaid, the Senior Assistant Registrar be empowered to execute it on the defendant's behalf.

At the hearing of the application, Counsel for the plaintiff informed the Court that he was abandoning all other prayers except that for the mandatory injunction in the terms I have described in the preceding paragraph. He is also pursuing the prayer for further or other relief and for the costs of the application.

The brief history of the dispute leading to this application is that by a contract dated 13 August 1986 entered into between the defendant and Koperatif Serbaguna Malaysia Bhd. ("KSM"), the defendant agreed to execute water supply reticulation and ancillary works for the proposed housing development on the said lands. This contract has been produced as Exhibit L-2 to the affidavit of Liew Yuet Siong dated 18 March 1992 which has been filed in support of Enclosure (2). On 8 August 1986, a receiver was appointed over the assets of KSM. On 23 January 1987, the plaintiff wrote to the defendant a letter which is

produced as Exhibit L-4 to Liew's affidavit. The plaintiff's case is that this letter comprises a separate contract between itself and the defendant and it is based on this document that the action herein has been brought. The letter therefore is of critical importance and for that reason I reproduce its contents in full below:

Our Ref: (44) BR/VIC/SER/085/CKH

23 January 1987

M/s. Ang Yoke Lian Construction Sdn. Bhd.
53000 Kuala Lumpur

Dear Sirs

Water supply system works
KSM / Serdang Raya schemes joint venture

With reference to your letter dated 13 January 1987 and the subsequent discussions between the undersigned and your Mr. Wei, we confirm below the terms agreed for the completion of works.

(1) Bandar Raya Developments Bhd. (BRDB) shall honour the balance (65%) of the 4th Certificate on behalf of KSM. This payment of amount $66,512-92 shall be made out to Ang Yoke Lian (AYL) before 28 January 1987.
(2) BRDB shall honour the future payment certificates in full for the remaining Works (65% of such amounts will be paid by BRDB on behalf of KSM).
(3) AYL shall ensure that the Works including commissioning must be practically completed to enable water supply to Taman Serdang Raya Scheme by 16 March 1987. However the full scope of the Works is to be completed by the end of March 1987.

In the event that AYL should fail to complete the works by the above dates accordingly he shall pay to BRDB for such default the sum computed at the rate of $4,000 per day as liquidated damages for delay.

BRDB reserves the exclusive right to effect such liquidated damages and no extension of time will be considered.

This letter is sent to you in duplicate, please confirm acceptance and return the same.

Thank you.

Yours faithfully,

Sgd Bandar Raya Developments Berhad

Yew Ah Bean
Assistant General Manager

c.c. Mr. Lawrence Chan - Executive Director,
Bandar Raya Dev. Bhd.

M/s. H.S. Liao & Rakan - Project Engineers

YAB/CKH/fcf

I/We confirm acceptance to all the terms stipulated above.

Sign: Sgd Wei Tiam Chen

Date: 23 January 1987

As can be seen from the document, the defendant has assented to the terms contained in it by signing at its foot under the endorsement that recites acceptance of the terms. The document however does not refer to an obligation on the part of the defendant to execute Form KA-1 or to hand over the water system to the Jabatan Bekalan Air. The plaintiff's case is that such a term is to be implied into the document and enforced against the defendant. The plaintiff, by its Counsel, has argued that the balance of convenience lies in favour of the performance of the act demanded of the defendant and has offered to secure the defendant's position by paying the sum which the defendant claims is owing to it from KSM. This in fact forms the nub of the defendant's grouse which is that it will not sign any document as that described because KSM owes it money for work done. This is clear from its solicitors' letter dated 6 December 1990 which is in the following terms:

Our Ref: OTK/L-295 Date: 6 December 1990

Your Ref: PC/KV/9526/85

M/s. Philip Choong & Co.
Advocates & Solicitors
Kuala Lumpur

Dear Sirs

Re: Water Supply System Works
KSM / Serdang Raya schemes joint venture

We act for Ang Yoke Lin Construction Sdn. Bhd.

Your letter of 26 November 1990 has been handed to us with instructions to reply thereto.

Our client maintains that they have complied fully with your request to complete the necessary waterworks within time. Our clients are under no duty to hand over the project to you and or other persons until they are fully paid for all outstanding payments.

In the premises unless your clients are prepared to settle the outstanding owing to our clients under the contract our clients are not prepared to hand over the project to whosoever.

If you have instructions to file proceedings we have instructions to accept service.

Yours faithfully

Sgd: M/s. Paul Ong & Associates

The plaintiff has disputed that the defendant is entitled to any monies but is nevertheless prepared to secure the defendant's claim in exchange for the performance of the act sought to be compulsorily enforced by means of the injunction sought for. It is not disputed that the project has been completed and that the houses constructed on the said lands have been occupied by purchasers. It is also not disputed that water is being supplied to the project and that whilst the residents have to pay $5 the plaintiff is paying the water authority the commercial rate for every gallon supplied to the project.

The defendant resists the plaintiff's application on several grounds. Encik Abraham, Counsel for the defendant, made what I consider to be some important submissions and I propose to summarise them in the same order in which they were made. I do not intend to advert to every sub-point that he took as I am of the view that the principal submissions which I now set out sufficiently cover all the materials he has put forward. The submissions are as follows:

(1) The plaintiff is not the correct party to the contract. The real contract which is the subject matter of the dispute is Exhibit L-2 made between the defendant and KSM. Clauses 3 and 4 of that contract provide against the defendant subcontracting or assigning the contract to a third party, in this case the plaintiff. No evidence has been led of an assignment of the contract in Exhibit L-2. It is further submitted that the date of Exhibit L-2, that is 13 August 1986, is important. Counsel them referred to Exhibit L-1 which is a letter dated 29 September 1986 from KSM to the plaintiff. That letter is reproduced below.

a 29 September 1986

Mr. Yew Ah Bean
Bandar Raya Developments Bhd.
Lot 40383 Jalan Penaga
59100 Kuala Lumpur

Dear Sir

b *Joint venture water supply system*
KSM - Serdang Raya Housing Projects

With reference to the above works we wish to inform you that due to arrears from interim payment claims the contractor has opted to stop work.

c As the contract works is a cost-sharing joint venture between KSM and Serdang Raya of Bandar Raya Developments Bhd we wish to bring the matter to your attention. The consultant has advised that this may result to delay in completion hence availability of water supply by December 1986.

d Since 8 August 1986 KSM has been restrained by the freeze on Co-operative Societies imposed by Bank Negara and thus unable to fulfill contractual obligations like disbursement of project claims.

In the circumstances we seek your kind consideration and assistance for Bandar Raya
e Developments Bhd. to meet the said payment claims. It would enable the contractor to resume work so as to achieve the targeted completion date.

Such reimbursement if possible shall be offset against BRDB' contribution of the Joint
f venture which is in the respective proportion:

KSM - 65%

Serdang Raya - 35%

We append here with the pertinent details to the Contract for your information:

g

Contract Sum	- $1,260,500.00
Commencement Date	- 18 March 1986
Completion Date	- 18 December 1986
Progress of work to date	- approximately 60%
1st Progress Claim due 4 August 1986	- $377,476.15
2nd Progress Claim due 29 August 1986	- $104,512.18

h Attached are copies of the Certificate of Payment by the Project Engineers, M/s. H.S. Liao & Rakan, for your reference.

If the foregoing is in order please make the payment directly to the contractor M/s. Ang
i Yoke Lian Construction Sdn. Bhd.

Your kind attention and assistance is much appreciated.

Thank you.

Yours faithfully
Bandar Raya Developments Berhad

Sgd. Bandar Raya Developments Berhad

Tam Cheok Wing
Senior Project Manager

c.c. Mr. Thuan Paik Phok - Chairman
KSM Housing
Sub-Committee

Mr. Lawrence Chan - Executive Director
Bandar Raya
Developments Bhd.

enc.

TCW/CKH/lt

Encik Abraham submits that 3 matters arise out of this letter, Exhibit L-1. First, on 8 August 1986 receivers had been appointed over the assets of KSM. The receivers on such appointment will have to decide whether they want to carry on with the contract (L-2) or not. If they decide to terminate, the contractual arrangements will come to an end. Since the receivers' appointment on 8 August 1986, one does not know, by looking at the signature on behalf of KSM on Exhibit L-1, whether the receivers authorised the execution of this contract. Further, Exhibit L-8 is an agreement between KSM and one Perumahan Serdang Utama Sdn. Bhd. which covers the same project and which has been executed by the receivers on KSM's behalf.

The second matter that arises out of Exhibit L-2, Encik Abraham submits, is that one does not know whether the contract has been terminated by the receivers or by the defendant itself. Pausing here for a moment, I observe that there is no allegation by the defendant anywhere in the several affidavits filed on its behalf that it terminated the contract in Exhibit L-1 or that there had been an assignment of that contract to the plaintiff by KSM or that the receivers had terminated the contract in Exhibit L-1. Obviously, if there had been such a termination, my attention would have been brought to it. Therefore, with all respect due to Counsel, I am of the opinion that this point is really one without substance and having no direct bearing whatsoever upon the principal issues before me.

The third matter which Counsel submits arises out of Exhibit L-1 is that there is a reference in the 4th para thereof to a division of 65% and 35% of the reimbursement contribution between KSM and Serdang Raya with no reference to the plaintiff.

Counsel's submission on his first point was that the contract dated 13 August 1986 in Exhibit L-2 still subsists and that KSM is the proper contracting party. This, he says, is borne out by the conduct of the receivers in executing Exhibit L-8. He also referred me to 2 other exhibits, namely Exhibit W-2 annexed to the affidavit of Wei Tiam Chen dated 10 June 1992 and filed on the defendant's behalf. That document is a Certificate of Practical Completion dated 17 June 1987 issued by Messrs. H.S. Liao & Rakan, Chartered Engineers. It refers to Clause 47 of the contract dated 13 August 1986 (Exhibit L-2) and states that certain works had been completed to the satisfaction of the engineers as at 11 May 1987. Exhibit W-2 is copied to KSM for the attention of the receivers. Counsel for the defendant submits that the date of Exhibit W-2, that is, 17 June 1987, is significant because the contract which the plaintiff claims to have with the defendant is dated 23 January 1987. Counsel then asked the question: if that is so, why was the consultant engineer certifying the completion of works under the main contract?

The second document I was referred to was Exhibit W-1 also produced under Wei's affidavit. This is a Form KA-1 executed by the defendant and KSM and dated 6 February 1987 for Part A of the works concerning the water supply reticulation. Counsel for the defendant submitted that this document demonstrates that the contract between the defendant and KSM was still in existence and that the documentary evidence to which my attention has been drawn, especially Exhibits W-1 and W-2 demonstrate that they are inconsistent with the contract between the plaintiff and the defendants as alleged by the plaintiff to exist in terms of Exhibit L-4. Encik Abraham also referred to para 4 of the Amended Statement of Claim which pleads that the assets of KSM were frozen by the appointment of receivers by Bank Negara. I was also referred to para 5 of the same pleading which refers to the contract contained in Exhibit L-4. In para 7 of

the Amended Statement of Claim, which Encik Abraham says is important, it is pleaded that the contract in Exhibit L-2 was superceded by the contract in Exhibit L-4. Counsel then argued that the documentary evidence which he had read to me shows quite categorically that does not appear to be the correct position.

In answer to Encik Abraham's submission on the first point, Encik Sri Ram, Counsel for the plaintiff submitted that the 2 contracts, Exhibit L-4 and Exhibit L-2 had separate existence. Insofar as the obligation to deliver the works to Jabatan Bekalan Air with Form KA 1 executed, this is not to be found even in Exhibit L-2 and there was nothing inconsistent with the 2 contracts existing side by side with so much of the obligations as contained in L-4 superceding the contract in L-2.

There is much strength in the argument of plaintiff's Counsel. The matter is really one that turns on the true intention of the parties as expressed in writing. On a proper construction of the 2 contracts, I find no inconsistency between them. The contract contained in Exhibit L-4 *prima facie* creates separate and distinct obligations between the plaintiff and the defendant with each party providing consideration for the performance of the obligations of the other. The law recognises that more than 1 contract can exist in respect of the same subject matter (See *Shanklin Pier Ltd. v. Detel Products* [1951] 2 KB 854 and Chitty on Contract, 26th Edition, Vol. 1 para 1323).

Accordingly, in my judgment, the proper parties to the contract upon which this action has been brought, namely, that contained in Exhibit L-4, are the plaintiff and the defendant. The plaintiff is entitled to rely on the independent contract which it had entered into with the defendant. Consequently, with respect and regret I am unable to accept Encik Abraham's submission on his first point.

(2) The second point raised by defendant's Counsel is that in contracting with the defendant in Exhibit L-4, the plaintiff was not entering into any obligation as principal but merely acting as agent for KSM. Encik Abraham argues that the matter is really one of construction and with that submission I am in complete agreement. So is Counsel for the plaintiff. Encik Abraham has drawn my attention to the phrase "on behalf of" which appears in sub-paras 1 and 2 of Exhibit L-4. His submission is that this phrase conclusively demonstrates that the plaintiff was acting as agent for KSM. In support of his submission, Counsel has referred me to the commentary in Pollock & Mulla on Indian Contract and Specific Relief Acts, 10th Edition, on s. 230 of the Indian Contract Act 1872 which is in *pari materia* with s. 183 of our Contracts Act 1950, the relevant part of which provides:

> In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

In the commentary to the corresponding Indian section which I have referred to a moment ago, the learned authors say this:

> On the other hand the words "on account of" or "on behalf of" a named principal in the body of the contract are sufficient to exclude personal liability, notwithstanding an unqualified signature; and words of description in the body of the instrument, such as "charterer," which might make the agent personally liable without a clear qualification of the signature, will not counteract such a qualification.

The authority footnoted by the learned authors in the text with respect to the phrase "on behalf of" is *Ogden v. Hall* [1879] 40 LT 751. In that case, the agreement stated "I hereby agree on behalf of Mons. Beluze Pottier, Roanne, Loire, France, to engage Amos Ogden overlooker, at the rate of 41. per week, with travelling expenses there and back. The sum of £1. 10s. per week to be paid to his wife every fourteen days." The document was signed, "Robt. Hall, per John Hall." The Court there held that the question whether the person actually signing a contract is to be deemed to be contracting personally or as agent only, depends upon the intention of the parties, as discoverable from the contract itself and proceeded to state that as a general rule, that where a person signs a contract in his own name without qualification, he is *prima facie* deemed to be contracting personally, unless it was apparent from the terms of the contract that he did not intend to so contract but was acting only as agent. On the facts of that case, the Court held that the defendant had entered

into the contract on behalf of a disclosed principal and accordingly was not personally liable.

Encik Abraham further submitted that although the signature on L-4 is an unqualified signature of the plaintiff, looking at the body of the agreement, the words "on behalf of" appear therein and payments are being made on behalf of a named principal and therefore the plaintiff cannot maintain this action in view of the clear provisions of s. 183 of the Contracts Act 1950.

Having read and re-read the contract in Exhibit L-4 on several occasions, I am of the view that the plaintiff was not contracting as agent but as principal. Although the words "on behalf of" appear in the body of the document, if one were to look at the contract as a whole, it appears that the parties intended that each of them should contract as principal. Thus, the contract expressly provides that in the event of the defendant being in default it shall be liable to the plaintiff and not to KSM or to the plaintiff on behalf of KSM. In my judgment, the contract in Exhibit L-4, when read as a whole, does not put the plaintiff in the position of an agent and the words "on behalf of" do not in the context of this contract have the effect of making the plaintiff an agent for KSM. The true purport of the contract is, in my judgment, that the parties recognise that KSM had an obligation towards the defendant to make payment and has not done so and the plaintiff was now undertaking the fulfillment of that obligation in the place of KSM whilst the defendant agreed that in consideration of the plaintiff so doing, it will fulfill its obligations as intended by the parties in Exhibit L-4. Any other construction would render the obligation on the part of the defendant to pay damages to the plaintiff for default ineffective and clearly out of place which would in my judgment smack down the true intention of the parties.

By reason of what I have expressed hereinbefore, I am compelled to reject the submission of defendant's Counsel on his second point. Before moving on, I observe that the agency point has neither been pleaded in the defence which was delivered on 2 April 1992 nor in the several affidavits filed on the defendant's behalf. The point is one of critical importance to the defendant' for if the defendant and the plaintiff had truly intended that the latter was to act only as agent for KSM, one would reasonably expect to find the challenge taken in the pleadings and affidavits. I therefore find strong justification in the contention of plaintiff's Counsel that this agency point is really an afterthought.

(3) The third point (appearing as Mr. Abraham's 4th point in the summary of his submissions when he opened his argument) is that the contract contained in Exhibit L-4 is one the terms of which are uncertain. Counsel submits that it is an incomplete document and that in accordance with well settled principles, equity will not decree specific performance of a contract the terms of which are uncertain following upon which it will also refuse an injunction where specific performance will not lie. I was then referred to the provisions of s. 20(1)(2) and s. 54(f) of the Specific Relief Act 1950.

In support of his submission, Counsel referred to me to the 1st para of Exhibit L-4 in which reference is made to a letter dated 13 January 1987 which is Exhibit L-17. I reproduce it below:

Tarikh: 13 January 1987

M/s. Koperatif Serbaguna Malaysia Bhd.
Kuala Lumpur

Dear Sirs

Re: Proposed Housing Development on Lots 3399, 3400, 3505 & 3506. Mukin of Serdang District of Petaling, Selangor for KSM Bhd. - Contract No. 2 : Water Supply Reticulation System & Ancillary Works -

With reference to the discussion held on 12 January 1987 with Mr. Chua, Mr. Yew and our Mr. Wei, we take pleasure to inform you that the project will be completed at end to March 1987 as shown in attached revised programme if the following supports are available from you.

(i) 4th certificate to be honoured in full without any contra in order for us to settle the outstanding payment with our suppliers before Chinese New Year and to finance the project after the festival.
(ii) For forth coming payment certificate shall be honoured in full without any deduction for contra. (By Mid Feb 1987)

(iii) Electricity will be made available by your good office for commissioning the pumping system.

We trust the above will meet with our kind requirement and look forward to your favourable answer.

Thank you.

Yours faithfully,

Sgd: Ang Yoke Lin Construction Sdn. Bhd.

Director

c.c. M/s. H.S. Liao & Rakan
c.c. M/s. C.H. Ong Akitek Berakan

Counsel submitted that if one looks at the letter before action written by solicitors for the plaintiff, it refers to an agreement of 13 January 1987 so that the 2 documents, namely, L-17 and L-4 appear to constitute the contract. Consequently, says Mr. Abraham, the document L-4 is incomplete.

A further submission on this point was made to the effect that the contract relied upon by the plaintiff is a building contract and a contract for personal services and incapable of specific performance. Counsel cited *Vethanayagam v. Karuppiah* [1968] 1 MLJ 283 as authority for the proposition that an interim injunction will not be granted where a contract is not specifically enforceable. It was also submitted by Encik Abraham that the interlocutory mandatory injunction sought for should not be granted as it would violate ss. 20(1)(a), (b) and (c) and s. 54(f) of the Specific Relief Act 1950.

As I have said earlier, I have read and re-read the contract in Exhibit L-4 several times and I am left in no doubt of its terms. The fact that it refers to an antecedent document which I have also read and addressed my mind to does not detract from its plain terms. The only issue is whether there is to be implied into the contract sued upon, a term requiring the defendant to execute Form KA-1, but that is a matter to be considered separately. In my judgment, the fact that a term has to be implied into a contract does not make the contract itself uncertain. The mutual obligations of the respective parties are clearly spelt out in the contract under consideration and all that is left for me to determine, *vis a vis* its terms, is the implication of an obligation which was clearly in the contemplation of the parties as being necessary to give effect to their true intention as disclosed in the document. That, with respect, is a separate question which I will deal with when considering Encik Abraham's submissions on that point.

I now turn to deal with Encik Abraham's submission that the contract in question is a building contract or one involving personal services and will not be specifically enforced, and in consequence no injunction will be granted. Having considered the facts of this case, I must confess I am unable to follow and go along with this submission of Counsel. As I have said, the only issue is whether the defendant is under an obligation to execute Form KA-1 and hand over the water system for the project to the Jabatan Bekalan Air. The works have already been physically completed and this appears to be common ground between the parties. So I have asked myself the question: what building contract or contract for personal services is being sought to be enforced? Having undertaken a searching analysis of the facts, my answer is in the negative. An injunction compelling a defendant to execute and deliver up a letter or other document is not an unknown remedy and does not amount to an enforcement of personal services. (See *T.R. Hamzah & Yeang Sdn. Bhd. v. Lazar Sdn. Bhd.* [1985] 2 MLJ 45). In the circumstances, I find no merit in this argument advanced by the defendant and I accordingly reject the same.

With regard to Encik Abraham's submission on the applicability of s. 54 of the Specific Relief Act 1950 to interlocutory or interim injunctions, I would respectfully refer to the decisions of Edgar Joseph Jr. J. (as he then was), in *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323 and V.C. George J., in *Bina Satu Sdn. Bhd. v. Tan Construction* [1988] 1 MLJ 533, both of which are authority for the proposition that s. 54 is concerned with perpetual or final injunctions and are not relevant when considering the grant or refusal of interlocutory injunctions. In my judgment, be it a prohibitory or a mandatory injunction of an interlocutory or interim nature, the governing provisions are those contained in s. 51(1) of the Specific Relief Act 1950 and I derive support for my view from the decision of the Federal Court in *T.R. Hamzah & Yeang Sdn. Bhd. v. Lazar Sdn. Bhd. (supra).*

For the reasons I have given hereinbefore, I reject the submissions made by Encik Abraham on his third point and hold that the contract in Exhibit L-4 is one the terms of which are reasonably certain and that its enforcement by injunction is not precluded by the provisions of the Specific Relief Act 1950 that have been relied upon the defendant.

(4) The 4th point made by Encik Abraham (which appears as the 6th point in the summary of his submissions when he opened his submissions) is that relating to the principles governing the grant of interlocutory mandatory injunctions. In the course of opening the case for the plaintiff on the application, Encik Sri Ram relied upon the judgment of Hoffmann J. in *Films Rover International Ltd. v. Cannon Fil Sales Ltd.* [1987] 1 WLR 670 and in particular upon the passages appearing at pg. 679-682 of the report. This is what Hoffmann J. had to say in regard to the test that should be applied when deciding to grant or withhold a mandatory injunction at the interlocutory stage:

> In the forefront of his argument Counsel for Thorn-EMI submitted that the Court should not grant an interlocutory mandatory injunction, amounting to specific performance of one of Thorn-EMI's alleged contractual obligations, unless there appeared a high probability that Films Rover would succeed in establishing its legal right at the trial. In this case the Court of Appeal has gone no further than to say that Films Rover has an arguable case and, as I have already said, I propose to treat that as meaning that Films Rover is at least as likely to fail as to succeed. Counsel said that fell well short of the standard of persuasion necessary for the grant of an interlocutory mandatory injunction.
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> In support of this proposition, Counsel for Thorn-EMI relied in particular on the recent decision of the Court of Appeal in *Locaball International Finance Ltd. v. Agroexport* [1986] 1 WLR 657, 664, in which Mustill L.J. (with whom Balcombe L.J. agreed) approved the following passage from the judgment of Megarry J. in *Shepherd Homes Ltd. v. Sandham* [1971] Ch. 340, 351:
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> "Third, on motion, as contrasting with the trial, the Court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case, the Court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

Mustill L.J. went on to say that although this judgment pre-dated *American Cyanamide Company v. Ethicon Ltd.* [1975] AC 396 the statement of principal "in relation to the very special case of the mandatory injunction" was not affected by what had been said in the House of Lords in that case.

I would respectfully agree that there is no inconsistency between the passage from Megarry J. and what was said in the Cyanamide case. But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as "guidelines", that is useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principle dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.

The passage quoted from Megarry J. in *Shepherd Homes Ltd. v. Sandham* [1971] Ch. 340, 351 qualified as it was by the words "in a normal case" was plainly intended as a guideline rather than an independent principle. It is another way of saying that the features which justify describing an injunction as "mandatory" will usually have the consequence of creating a greater risk of injustice if it is granted rather than withheld at the

interlocutory stage unless the Court feels a "high degree of assurance" that the plaintiff would be able to establish his right at the trial. I have taken the liberty of reformulating the proposition in this way in order to bring out two points. The first is to show that semantic arguments over whether the injunction as formulated can properly be classified as mandatory or prohibitory are barren. The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that the cases in which there can be no dispute about the use of the term "mandatory" to describe the injunction, same question of substance will determine whether the case is "normal" and therefore within the guideline of "exceptional" and therefore requiring special treatment. If it appears to the Court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the Court does not feel a "high degree of assurance" about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction.

In *Shepherd Homes Ltd. v. Sandham*, Megarry J. spelled out some of the reasons why mandatory injunctions generally carry a higher risk of injustice if granted at the interlocutory stage; they usually go further than the preservation of the *status quo* by requiring a party to take some new positive step or undo what he has done in the past, an order requiring the party to take positive steps usually causes more waste of time and money if it turns out to have been wrongly granted than an order which merely causes delay by restraining him from doing something which it appears at the trial he was entitled to do; a mandatory order usually gives a party the whole of the relief which he claims in the writ and makes it unlikely that there will be a trial. One could add other reasons such as that mandatory injunctions (whether interlocutory or final) are often difficult to formulate with sufficient precision to be enforceable. In addition to all these practical considerations, there is also what might be loosely called "due process" question. An order requiring someone to do something is usually perceived as a more intrusive exercise of the coercive power of the state than an order requiring him temporarily to refrain from action. The Court is therefore more reluctant to make such an order against a party who has not had the protection of a full hearing at trial.

Megarry J. recognised, however, that none of these was a necessary concomitant of a mandatory injunction. For example, there is sometimes a sense in which a mandatory injunction is needed to preserve the *status quo*. In charter party withdrawal cases the commercial Court has frequently granted interlocutory injunctions restraining an order from using the ship otherwise than in accordance with the terms of the charter; see per Lord Denning M.R. in *Associated Portland Cement Manufacturers Ltd. v. Teigland Shipping A/S* [1975] 1 Lloyd's Rep. 581. Although negative in form, these are (in the case of a time or voyage charter) mandatory in effects because they require the owner to continue to provide the ship. In these cases, there is what might be called a "dynamic *status quo*" which consists in the continuing use of the vessel on the charterer's business. Counsel for the plaintiffs also referred me to *Continental Grain Co. v. Islamic Republic of Iran* [1983] 2 Lloyd's Rep. 620, in which the Court of Appeal made a mandatory order requiring owners to direct their vessel to deviate to a safe port and discharge cargo to which the plaintiff claimed title. The order was made because the Court considered that there was a serious question to be tried as to whether on the true construction of the Hague Rules the owners were under a contractual obligation to do so. Neither of the Lords Justices (nor for that matter Counsel) seem to have suggested that such an order should not be made unless the Court felt a high degree of assurance that the plaintiff's construction was right. On the contrary, Ackner L.J. said, at p. 623:

> Whether the argument will succeed or not is another matter. We have had the advantage of [the] submissions [of Counsel] for the [defendant] and it would be churlish to say that they do not lack force, but speaking for myself I am satisfied that there is a serious question to be argued on this subject.

I would venture to suggest that the *Continental Grain Co.* case was plainly a case in which, despite the mandatory character of

the injunction, the risk of the injustice which would be caused by "wrongly" withholding it was far greater than the risk of injustice if it turned out to have been wrongly granted. It is easy to construct other counter examples by way of exception to the proposition that mandatory injunctions are more drastic and irreversible in effect and involve greater expense and inconvenience if wrongly granted than prohibitory injunctions.

These considerations lead me to conclude that the Court of Appeal in *Locaball International Finance Ltd. v. Agroexport* [1986] 1 WLR 657, 664, was not intending to "fetter the Court's discretion by laying down any rules which would have the effect of limiting the flexibility of the remedy," to quote Lord Diplock in the Cyanamide guidelines for prohibitory injunctions which require a plaintiff to show no more than an arguable case recognise the existence of exceptions in which more is required (compare *Cayne v. Global Natural Resources Plc.* [1984] 1 All ER 225], so the guideline approved for mandatory injunctions in the Locaball case recognises that there may be cases in which less is sufficient. It is significant that both Mustill and Balcombe L.JJ. did not merely rely on the mandatory nature of the injunction. They went on to explain why in the particular circumstances of the case, the granting of the injunction would give rise to an unacceptable risk of injustice. Mustill L.J. said that the injunction would put the defendant "in an irretrievable difficulty," and that if they failed to comply, they had no officers or assets within the jurisdiction and there was no way in which the injunction could be enforced.

Encik Abraham has urged me not to follow the reasoning of Hoffmann J. in *Films Rover* on three principal grounds. I will deal with these but not necessarily in the order in which they were presented to me. Firstly, Counsel has argued that Hoffmann J. in formulating what I would term "the balance of justice test" has refused or declined to abide by the decision of the Court of Appeal in Locabail. Secondly, he has argued that the balance of justice test is a departure from the time honoured burden placed on a plaintiff and re-stated by Megarry J. in *Shepherd Homes* (what I would term "the *Shepherd Homes* test"). Thirdly, Encik Abraham submits that the approach adopted by Hoffmann J. in *Films Rover* forms no part of Malaysian common law which still requires the *Shepherd Homes* test to be met by a plaintiff seeking an interlocutory mandatory injunction. I will now deal with each of these grounds.

A careful reading of Hoffmann J.'s judgment in *Films Rover* leaves me with no impression of disobedience to the doctrine of *stare decisis*. The learned judge, as can be seen from the material part of his judgment which I have reproduced above, has taken pains to show that the Locabail case not laying down any general fetter upon the discretion vested in a Court of Equity when deciding whether to grant a mandatory injunction. What Hoffmann J. has correctly pointed out is that there may be cases which do not attract the *Shepherd Homes* test. In so doing, I am not convinced that he was going against established authority. Consequently, I am unable to accept this ground advanced by Counsel as constituting a valid criticism of the judgment of Hoffmann J.

With regard to the second ground advanced by Counsel, once again, reading the judgment in *Films Rover* as a whole, it is quite apparent that the learned judge there was not seeking to depart from the *Shepherd Homes* test but was merely drawing the parameters of that test As can be seen from the passages that I have quoted from the judgment in *Films Rover*, the test formulated by Megarry J. in *Shepherd Homes* was being merely explained and its limits being prescribed. No one can again say that there will be cases which may clearly fall outside the parameters of the *Shepherd Homes* test. I would observe, in passing, that the reasoning of Hoffmann J. has been adopted in Australia by Gummow J, in *Businessworld Computers Pty Ltd. v. Australian Telecommunications Commission* [1988] 82 ALR 499, who has provided reinforcement for that reasoning. For these reasons, I do not regard the second ground as affording a valid criticism of the decision in *Films Rover*.

I now turn to the third and more formidable ground urging me to refuse to follow the balance of justice test. By reference to numerous Malaysian authorities from the highest Courts, Encik Abraham has argued that our Courts require a plaintiff to satisfy the *Shepherd Homes* test when moving the Court for an interlocutory mandatory injunction. The two Malaysian cases in which the balance of justice test laid down in *Films Rover* have been referred do not, in the submission of Counsel,

constitute an acceptance of that test in our jurisdiction. The two cases are, *Boonsom Boonyanit v. Adorna Properties Sdn. Bhd.* [1990] 3 MLJ 444 and Tan Lay Soon v. Kam Mah Theatres Sdn. Bhd. [1992] 4 CLJ 1922. The Malaysian cases where the higher test (a description accorded to the *Shepherd Homes* test) has been adopted and applied are legion. They have all been cited to me by Counsel and I do not think I am doing Counsel an injustice if I do not deal with all of them in detail. I feel, however, duty bound to list them out in my judgment in deference to the industry of Counsel. The cases are:

(i) *Wah Loong (Jelapang) Tin Mine v. Cheah Ngen Yiok*, [1975] 2 MLJ 109;
(ii) *Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd.*, [1979] 1 MLJ 150;
(iii) *Bank Islam Malaysia Bhd. v. Tinta Press Sdn. Bhd. & Ors.*, [1986] 1 MLJ 256;
(iv) *Tinta Press Sdn. Bhd. v. Bank Islam Malaysia Bhd.*, [1987] 2 MLJ 192
(v) *Senator Lau Keng Siong & Anor. v. Ng Cheng Kiat*, [1990] 3 MLJ 417;
(vi) *RCA Sdn. Bhd. v. Pekerja-Pekerja RCA Sdn. Bhd. & Ors.*, [1991] 1 MLJ 309.

Whilst I think there is much force in the reasoning of Hoffmann J., I am persuaded by Mr. Abraham's argument that I ought not to follow it as it does not represent the Malaysian common law on the subject. I feel that an adoption of the balance of justice test may, despite my own view that it is correct, involve a departure from the judicial pronouncements made by Courts the decisions of which are plainly binding on me. In the circumstances, I hold that for the plaintiff to succeed in the instant case, it must show a strong and clear case or an unusually sharp case. In other words, the plaintiff must bring itself within and satisfy the *Shepherd Homes* test. In applying that test to the facts of this case, I bear in mind what was said by the Federal Court in *Gibb & Co. v. Malaysia Building Society Bhd.* [1982] 1 MLJ 271 at p. 273:

> The case however must be 'unusually sharp and clear *(Shepherd v. Sandham)*, and the Court must feel a high degree of assurance that at the trial a similar injunction would probably be granted **but we should observe that questions of degree are involved which depend *inter alia* upon consideration of hardship to the parties.** In deciding the manner of interlocutory injunction that should be granted Courts of Equity will consider how the interests of the parties may best be protected, bearing in mind both the position of the parties subsequently at the final hearing and also questions of hardship and inconvenience in the meantime, and will take into account any other relevant discretionary considerations which may arise. One of the most important circumstances which will be taken into account by the Court is the degree of probability with which it appears to be established that the applicant will ultimately succeed at the final hearing. The stronger the case of the applicant that the matters complained of are unlawful, the more likely it is that it will be found to be just and equitable that his interests be protected by the immediate issue of an injunction (*Bonner v. Great Western Railway Company* [1883] 24 Ch. D. 1, 10). Other matters of particular importance are, on the one hand, the ease or difficulty with which there can be compliance with a mandatory order and the extent of hardship which compliance will cause the respondent and, on the other hand, the nature of the injury and incovenience which will be caused to the applicant if he does not obtain protection at once (*Strelley v. Pearson* [1880] 15 Ch. D. 113, 117 (at p. 117).
> (Emphasis Supplied)

I will at the appropriate stage of this judgment apply this test to the facts of the case before me and give my conclusion and my reasons for the same.

(5) Counsel for the defendant has submitted as his fifth point that a term should not be implied into the contract contained in Exhibit L-4 requiring the defendant to execute Form KA-1 and to hand over the water system to the Jabatan Bekalan Air. Encik Abraham says that I should be extremely reluctant to do so at the interlocutory stage when the evidence is incomplete on the subject. He has cited to me a number of cases in his written submission on this point in which he says a term was implied only after a full trial.

In my judgment the test for implying a term is necessity. That test was formulated in *Liverpool City Council v. Irwin* [1977] AC 239, affirmed as correct and applied by the Privy Council in *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] 1 AC 80. Each

case must necessarily fall to be decided on its own facts. Whether necessity dictates the implication of a term into a contract must vary from case to case.

On the facts before me, I am left in no doubt that the plaintiff has made out a very strong case for a term to be implied into the contract in Exhibit L-4 imposing upon the defendant an obligation to complete and execute Form KA-1 and hand over the water system to Jabatan Bekalan Air. According to the defendant, the term should not be implied because it is an afterthought and was therefore not in the contemplation of the parties at the material times, that is, when the contract was made. I cannot agree with this contention as it flies in the face of the defendant's own position taken in its affidavits. Thus, in para 18 of Wei's affidavit dated 10 June 1992 (to which I have already referred earlier in this judgment) the defendant admits or concedes that obligation to sign the form and to hand over the water system to Jabatan Bekalan Air is part of its contract with KSM, that is to say, Exhibit L-2. However, I have read Exhibit L-2 most carefully and I am unable to discover any such obligation expressed in that contract. The defendant therefore agrees that this obligation is to be implied in its contract with KSM in respect of this very same project. How then can it say that the term can find no room in the co-existent or parallel contract which it entered into with the plaintiff in respect of this project? Looking at the conduct of the defendant and the plaintiff against the background of events, I am not entirely sure of the defendant's *bona fide* in the matter. Of course, it is not open to me to make any firm pronouncement on the matter at this interlocutory stage and I refrain from doing so. However, the facts when taken together, leave me in no doubt that the plaintiff will succeed at the trial in obtaining an injunction in terms of that prayed for in its interlocutory summons. The plaintiff has, in my judgment, made out a strong and unusually sharp case for the grant of interlocutory relief. I am satisfied that the term sought to be implied would certainly be implied at the close of all the evidence at the trial of the action. Having been driven to this conclusion, I am compelled to reject the submissions made by the defendant on this point and I accordingly do so.

(6) The defendant has also urged me to refuse the relief sought for on discretionary grounds. Encik Abraham has invited me to a number of points which he says I should take into account when exercising my discretion and that I should at the end of the day refuse relief on those points. I will deal with these in turn. First, it is said that the plaintiff is guilty of long and inordinate delay and that on this ground alone interlocutory relief should be denied it. Encik Abraham has cited a number of cases, including *Evercrisp Snack Products (M) Sdn. Bhd. & Anor. v. Sweeties Fool Industries Sdn. Bhd.* [1980] 2 MLJ 297. It must be observed that in all the cases cited by Encik Abraham, the defendant had already embarked upon a course of action during the period of the delay. In determining whether to issue a mandatory injunction, the steps already taken by a defendant would be most relevant as it would be practically unjust to compel him to depart from a course of conduct upon which he has already embarked. On the other hand, the case of a defendant who has done nothing and who will suffer no hardship whatsoever and who has suffered no prejudice because of any delay on the plaintiff's part must surely fall to be judged on different considerations. After all, what is being sought is an equitable and discretionary remedy. The effect of delay upon the interlocutory remedy of an injunction has been dealt with by Dr Spry in his work Equitable Remedies, 4th Edition at p. 480 where he states that "mere unreasonable delay is not in itself sufficient to lead to a refusal of relief: there must be a further consideration, such as prejudicing of the position of the defendant by reason of the delay in question, so that it becomes 'practically unjust' to grant the remedy that is sought."

I have taken into consideration everything Encik Abraham has said that is adverse to the plaintiff's case on the question of delay but at the end of the day I am left unconvinced that it has had any prejudicial effect upon the defendant. Indeed, Encik Abraham has been unable to demonstrate to me that the defendant has in any way been prejudiced and he

has in his reply to Encik Sri Ram's submission on this point left it completely unanswered. Exercising the discretion that I have and acting in accordance with well settled principles set out in the several Malaysian decisions cited to me, I am of the view that the plaintiff should not be denied his remedy on the ground of delay. I am persuaded to grant the relief despite the delay which I have taken into account when considering the exercise of my discretion.

The next discretionary ground raised is that the relevant parties are not before the Court. In particular, it has been submitted on the defendant's behalf that KSM should be a party to the suit. As I have said earlier, the contract which has a separate existence and which is sued upon is between the plaintiff and the defendant and I do not agree that in the exercise of my discretion I require KSM before me to enable me to arrive at a reasoned judgment on the application. Accordingly, I have taken this matter also into consideration when exercising my discretion and when deciding whether to grant or withhold the remedy asked for.

It is next submitted by the defendant that the balance of convenience lies against the grant of the relief sought. In particular, the defendant says that the purchasers of the houses in the development are not adversely affected because they are receiving water at $5 per month. But surely that it not the point. It is the injury that the plaintiff is suffering that is being overlooked by the defendant. The plaintiff has to pay the commercial rate for supply of water. In answer to that, Encik Abraham says that damages are an adequate relief because the financial harm that is being caused to the plaintiff can be quantified to the last cent. With respect, nothing is further from the truth, which is that the financial loss is a daily occurrence that will continue to run *ad infinitum*. To suggest that this is quantifiable is incorrect.

Again in dealing with the question of balance of convenience, Encik Abraham has raised the question of delay. I have sufficiently dealt with this earlier and I have taken the delay and its effect into account when exercising my discretion.

Bearing in mind the principles enunciated in *Gibb & Co.*, and taking into account all the relevant facts and circumstances of this case, I am left in no doubt that the plaintiff should be granted the injunction prayed for. In fact, I am convinced that a positive injustice would be rendered to the plaintiff if I did not grant it the remedy it asked for. However, applying those very principles to which I have referred, I am duty bound to ensure that the order I propose to make against the defendant does it no more harm than is absolutely necessary and that its interests are also sufficiently protected. This I believe can be achieved by directing the plaintiff, as a term of the injunction, to deposit into Court within 14 days from today the sum of $385,612.83 which figure is to be found in the defendant's counterclaim against KSM together with interest thereon at 8% per annum from the date of the contract with KSM, that is 13 August 1986 until the date of payment into Court. In the event of the plaintiff failing to make such payment, the injunction shall automatically and without more vacate. I therefore order and direct the defendant to execute Form KA-1 and hand over the water system to Jabatan Bekalan Air in respect of the project in question on the said lands within 7 days after the plaintiff making payment into Court as aforesaid. I also order that the plaintiff shall have the costs of this application in any event.

Further, I order and direct an early trial of the action and I am prepared to set aside dates in January 1993 for the trial of the suit. I am now prepared to hear Counsel on the consequential directions relating to the trial of the action which I will give in order to save time and costs.

Before concluding this judgment, I must express my appreciation to both Counsel for having made very careful and well researched submissions on behalf of the parties.